~~Clerk Supreme Court~~

109-143

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~223~~. 153

THE UNITED STATES, APPELLANT,

vs.

JOSEPH W. FISHER.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 29, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 293.

THE UNITED STATES, APPELLANT,

vs.

JOSEPH W. FISHER.

APPEAL FROM THE COURT OF CLAIMS.

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1 THE UNITED STATES OF AMERICA, *ss:*

United States Court of Claims.

I. *Petition.—Filed December* 10, 1879.—J. RANDOLPH.

JOSEPH W. FISHER, PLAINTIFF,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT. } No. 12117.

The said plaintiff, Joseph W. Fisher, complaining of the said defendant, The United States of America, for cause of action and claim against the said defendant, alleges that heretofore, to wit, on the 14th day of February, A. D. 1876, the said plaintiff was duly appointed and commissioned as chief justice of the supreme court of the Territory of Wyoming, and thereafter, to wit, on the 23d day of February, A. D. 1876, the said plaintiff duly qualified as chief justice of the supreme court of the Territory of Wyoming aforesaid, and entered upon the performance of the duties of said office of chief justice of the supreme court of said Territory, and has held and occupied and possessed said office continuously from the date last aforesaid until the 26th day of November, A. D. 1879, at which time the said plaintiff ceased to hold said office by reason of his resignation of the same and acceptance thereof by the President of the United States of America.

2 And the said plaintiff, Joseph W. Fisher, further alleges and shows that during all the period aforesaid, while he held and possessed, as aforesaid, the said office of chief justice of the supreme court of the Territory of Wyoming, he faithfully performed all the duties of said office, and was during all said time entitled to receive for his services a salary of three thousand dollars ($3,000) per annum as such chief justice by virtue of section one thousand eight hundred and seventy-nine (1879) of the Revised Statutes of the United States of America.

Said plaintiff further alleges that since the 30th day of June, A. D. 1877, the said defendant and its proper disbursing officers of the Treasury Department of the United States of America have neglected and refused to pay the said plaintiff the full amount of his salary as chief justice, as aforesaid, allowed and provided by law, as aforesaid, and since the date last aforesaid, and from thence until the 1st day of October, A. D. 1879, have paid the said plaintiff for his services as chief justice of the supreme court of Wyoming Territory at the rate of two thousand six hundred dollars per annum only, and no more, although during all the period last aforesaid the said plaintiff was entitled to receive from the said defendant for his services as chief justice of the supreme court of Wyoming Territory compensation therefor at the rate of three thousand dollars per annum.

Said plaintiff further alleges that by reason of the facts hereinbefore mentioned, stated, and alleged, the said defendant is justly indebted to him in the sum of nine hundred dollars; and that an account thereof is hereto attached and filed herewith, marked Exhibit (A).

Said plaintiff further alleges that the Treasury Department of the United

States of America, the said defendant, has refused to pay the said plaintiff for his said services, except as aforesaid, and still refuses to pay the balance of nine hundred dollars due to the plaintiff as aforesaid, for
3 the reason that no appropriation to pay the said balance has been made by the Congress of the United States of America.

Said plaintiff further alleges and shows that he is the sole owner of said claim, and that no other person or persons, party or parties, are in any manner or degree interested therein, and that no assignment or transfer of said claim, or any part thereof, or interest therein has been made, and that said plaintiff and claimant is justly entitled to the amount claimed herein from the United States, after allowing all just credits and off-sets, and that the said plaintiff and claimant herein is a citizen of the United States of America, and has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided or abetted, or given encouragement to rebellion against said Government.

Said plaintiff further alleges that he believes the facts stated in this petition to be true. Wherefore said plaintiff prays judgment against the United States of America for the said sum of nine hundred dollars and costs.

JOSEPH W. FISHER,
Plaintiff and Claimant,
By J. THOMAS TURNER,
His Attorney.

UNITED STATES OF AMERICA,
Territory of Wyoming, County of Laramie, ss:

I, Joseph W. Fisher, of said county and Territory, being first duly sworn, on my oath do depose and say that I am plaintiff and claimant named in the foregoing petition, that I have read said petition and know the contents thereof, and that the facts therein stated are true in substance and in fact.

JOSEPH W. FISHER.

Subscribed and sworn to before me this 1st day of December, A. D. 1879.

[SEAL.] WM. W. JEFFREY,
Notary Public.

4 EXHIBIT A.

The United States of America to Joseph W. Fisher, Dr.

1878.			
June 30.	For salary as chief justice of the supreme court of Wyoming Territory, for one year ending this day.....	$3,000 00	
	Cr. by cash, as per quarterly drafts.....	2,600 00	
	Balance due		$400 00

1879.

June 30.	For amount of salary as chief justice of said Territory to this date	$3,000 00	
	Cr. by drafts	2,600 00	
	Balance due		400 00
Oct. 1.	For one quarter's salary as chief justice, as above, at $3,000 per annum	$750 00	
	Cr. by draft	650 00	
	Balance due		100 00
	Total to June 30, 1878		400 00
	Do. to do. 30, 1879		400 00
	Do. to Oct. 1, 1879		100 00
	Due to date		$900 00

5 . UNITED STATES OF AMERICA,
Territory of Wyoming, County of Laramie, ss:

Before me, clerk of the district court in and for said county and Territory, came Joseph W. Fisher, to me personally known to have been chief justice in and for said Territory, who, being by me duly sworn according to law, did depose and say that the within stated account is just and correct, and that the same remains due and unpaid, and further deponent saith not.

JOSEPH W. FISHER.

Subscribed and sworn to before me the 11th day of December, A. D. 1879. Witness my hand and the seal of said court attached the day and year aforesaid.

T. J. FISHER,
Clerk District Court.

Filed by J. Thomas Turner, attorney for claimant.

6 AMENDED EXHIBIT A.

JOSEPH W. FISHER, PLAINTIFF,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT. } No. 12117.

In the United States Court of Claims.

And now comes the said plaintiff by his attorney, J. Thomas Turner, and files this his amended exhibit, marked A, giving a statement of his claim.

The United States of America to Joseph W. Fisher, Dr.

1878.

June 30.	For salary as chief justice of Wyoming Territory from July 1st, 1877, to this date	$3,000 00	
	Cr. by sundry drafts	2,600 00	
	Balance due		$400 00

1879.			
June 30.	For salary as chief justice of Wyoming Territory, from July 1st, 1878, to this date	$3,000 00	
	Cr. by sundry drafts	2,600 00	
	Balance due		$400 00
Nov. 26.	For salary from July 1st, 1879, to date	$1,216 66	
	Cr. by drafts	1,052 72	
	Balance due		$163 94
	Total balance due		$963 94

7 UNITED STATES OF AMERICA,
Territory of Wyoming, County of Laramie, ss:

Before me, clerk of the district court, in and for the county of Laramie and Territory of Wyoming, personally appeared Joseph W. Fisher, by me known to be the within-named plaintiff, who, by me being duly sworn, doth depose and say that the within stated account is just and correct, and that the same is due and unpaid according to the manner within stated, and further saith not.

JOSEPH W. FISHER.

Sworn and subscribed the 15th day of December, A. D. 1879, and the seal of said court affixed.

[SEAL.] T. J. FISHER,
Clerk District Court.

(Endorsement:) No. 12117. In the United States Court of Claims. Joseph W. Fisher vs. The United States of America. No. 12117. Plaintiff's amended Exhibit A. Filed December 24th, 1879. J. R., clerk.

8 II. *Traverse.—Filed Dec.* 22, 1879.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

9 III. *Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. The claimant was chief justice of Wyoming Territory from February 14, 1876, to November 26, 1879.

II. Up to and including June 30, 1877, he was paid his salary, at the rate of $3,000 a year.

III. From the 30th of June, 1877, to and including November 26, 1879, he was paid, and received without protest, compensation as such chief justice, at the rate of $2,600 a year.

CONCLUSION OF LAW.

Upon the foregoing findings of fact, the court decides as a conclusion of law, pro forma, in order that the question involved may be determined by the Supreme Court on appeal, that the claimant is entitled to recover the sum of $862.22.

IV. *Opinion of the court.*

RICHARDSON, J., delivered the opinion of the court:

The claimant was chief justice of the Territory of Wyoming from February 14, 1876, to November 26, 1879.

By Revised Statutes, section 1879, the annual salary of the chief justice and associate justices of all the Territories was fixed at $3,000 each.

The claimant was paid his salary at the rate of $3,000 a year up to and including June 30, 1877, the end of the fiscal year.

The act of March 3, 1877, chap. 102 (19 Stat. L., 294), making appropriations for the legislative, executive, and judicial expenses of the government for the year ending June 30, 1878, provided:

That the following sums be, and the same are hereby, appropriated out of any money in the Treasury not otherwise appropriated, in full compensation for the service of the fiscal year ending June thirtieth, eighteen hundred and seventy-eight, for the objects hereinafter expressed.

* * * * * * *

10 GOVERNMENT OF THE TERRITORIES.

* * * * * * *

Territory of Wyoming.—For salaries of governor, chief justice, and two associate judges, at two thousand six hundred dollars each. * * * (19 Stat. L., 309.)

The act of June 19, 1878, chap. 329 (20 Stat. L., 178, 194), making appropriations for the fiscal year ending June 30, 1879, contained the same provisions in the same language; and the act of June 21, 1879, chap. 34 (21 Stat. L., 223), re-enacted that act, with "the same provisions relating thereto," for the fiscal year ending June 30, 1880.

With the exception of the words "in full compensation" these acts begin with substantially the same formula used in all other appropriation acts of every description since the foundation of the government. These words were first introduced by the Forty-fourth Congress into the legislative, executive, and judicial appropriation act of March 3, 1877, before cited. The House of Representatives of the same Congress altered its rules so as to make it in order to incorporate into any appropriation bill such provisions or amendments "as being germane to the subject-matter of the bill shall reduce expenditures," and that rule, changed only in form, has ever since continued.

The struggle in the House of Representatives of the Forty-fourth and subsequent Congresses over the proposition to incorporate that provision into the rules of the House is historic. It cannot be disregarded in seeking to find the intention of those Congresses in departing from the otherwise uniform formula and inserting in the legislative, executive, and judicial appropriation acts, in which so many salaries are provided for, the important and significant words "in full compensation."

In Blake v. National Bank, 23 Wall., 317, the Supreme Court, in their opinion, examine & cite extensively the proceedings of the Senate & House of Representatives, the amendments offered and accepted or rejected, and the points of difference between the two Houses, in order to explain the meaning of the language finally agreed upon in the act there under consideration, and to determine the intention of Congress, as therein expressed.

These words, "in full compensation," have a clear, distinct, and well-understood signification, and cannot be overlooked or argued out of the statute. They must be allowed their full force and effect.

11 "The good expositor," says Lord Coke, "makes every sentence have its operation to suppress all the mischief; he gives effect to every word in the statute; he does not construe it so that anything should be vain and superfluous, nor yet makes exposition against express words." (Dwarris on Statutes, 577.)

In Bowen's case (14 C. Cls. R., 173, affirmed on appeal, 100 U. S. R.,) this court held that the introduction into a section of the Revised Statutes of the single word "such," which was not in the original act there revised and re-enacted, completely changed the law, and that decision was affirmed by the Supreme Court.

There is no ambiguity in the language of the acts now under consideration. We are not driven, therefore, to resort to any refinement of reasoning or technical rules of interpretation in order to establish by judicial construction what an expression in itself of doubtful signification should be held to mean.

The act of June 19, 1878, chap. 329 (20 Stat. L., 206), appropriating an amount for the claimant's salary, "in full compensation," for the year ending June 30, 1879, contained this provision:

"SEC. 3. That all acts or parts of acts inconsistent or in conflict with the provisions of this act are hereby repealed."

This section was re-enacted by the act of June 21, 1879, chap. 34 (21 Stat. L., 23), appropriating a like amount in full compensation for the year ending June 30, 1880.

Without that repealing section, which was not in the earlier act of 1877, the intention of Congress was equally clear. A general repealing clause like this, expressly repealing all inconsistent provisions of previous statutes, often introduced at the close of legislative enactments, is not necessary to give effect to the otherwise expressed intention of the legislature. It may intensify or emphasize that intention, but it is not required to give it force and effect.

In seeking to ascertain the meaning of a statute, it is the will of the legislature which must be determined; and the latest will of the latest legislature must control all previous enactments wherever they come in conflict, whether words of express repeal be used or not. Leges posteriores priores contrarias abrogant. (Wilcox case, 12 C. Cls. R., 495, affirmed

on appeal, 95 U. S. R., 661; Farden's case, 13 C. Cls. R., 347, affirmed on appeal, 99 U. S. R., 10; United States v. Freeman, 3 How., 565.) This is the controlling principle upon which all rules of construction are founded.

There is no doubt that the words "in full compensation" were introduced into these appropriation acts for the very purpose of reducing, for the respective years for which the appropriations were made, the compensation of those officers for whom the appropriations were less than the salaries established by previous laws. They were inserted as a compromise between those who favored a permanent reduction of salaries and those who opposed any reduction. A temporary reduction was finally agreed upon in this form.

12 With the expediency or inexpediency of the policy of Congress in thus reducing salaries temporarily, by provisions in annual appropriation acts, we have no concern. However objectionable such a course may seem to others, it is within the constitutional power of Congress, and must be respected and obeyed and not circumvented or evaded by the courts.

With some exceptions, Congress may at any time make alterations of the salaries of public officers, to take effect from the passage of the act. The only contract which arises upon a statute establishing a salary is to pay the incumbent of the office that salary while the law remains in force and unchanged. When the statute is repealed, superseded, or amended so as to alter the amount of the salary for the time being, the contract from that time forward is correspondingly changed. (Patten's case, 7 C. Cls. R., 362; Butler et al. v. Penn., 10 How., 402; Territory v. Pyle, 1 Oregon, 151; Koontz v. Franklin, 76 Penn., 156.)

The constitutional exceptions and limitations are, that the compensation of the President shall neither be increased nor diminished during the period for which he shall have been elected (Con., Art. II, § 1), and that the judges, both of the Supreme and inferior courts, shall receive for their services a compensation which shall not be diminished during their continuance in office (Con., Art. III, § 1).

That Territorial courts are not "inferior courts" within the meaning of the Constitution has been authoritatively determined. (Bonner et al. v. Porter, 9 How., 235; Clinton v. Englebrecht, 13 Wall., 447; Good v. Martin, 95 U. S. R., 98.)

Congress, therefore, had the power to reduce the claimant's salary either permanently or temporarily. For the fiscal years ending June 30, 1878, 1879, and 1880, they fixed his pay at $2,600 a year, in full compensation for his services; and this they did before he had entered upon his duties for those years. He thus had notice in advance of what his salary was to be, and by continuing in office thereafter he contracted to accept it on the terms of the statute. *

* In the case of Embry v. The United States, decided (100 U. S. R., 680.) by the Supreme Court on the same day that this opinion was delivered, the Chief Justice says: "The question here presented is not one of office, but of salary. Wherever the power of removal from office may rest, all agree that Congress has full control of salaries, except those of the President and the judges of the courts of the United States. The amount fixed at any time may be added to or taken from at will. No officer except the President or a judge of a court of the United States can claim a contract right to any particular amount of unearned compensation. If an officer is not satisfied with what the law gives him for his services he may resign."

13 We give no force to the fact that the claimant received the reduced rate without objection. He was entitled to the compensation which the law attached to his office, and the defendant's liability could not be discharged by paying a less sum, even though he had executed a receipt in full (Baldwin's case, decided at this term, 15 C. Cls., R.). We hold, as before stated, that the claimant's salary was reduced for the time being, and that he has been paid all he is entitled to receive.

A majority of the court are of opinion that the claimant's petition should be dismissed.

The question involved in the case is an important one. There are many public officers whose rights may be affected by its determination, and no one of them has a claim large enough to entitle him to appeal from an adverse decision of this court. In order that the case may be taken to the Supreme Court, where the law may be finally settled by the tribunal of last resort, the Attorney-General consents to the entry of a pro forma judgment for the claimant. This brings the case within the rules which we laid down in Bradshaw's case (14 C. Cls. R., 145) in relation to pro forma judgments.

The claimant will, therefore, have a pro forma judgment in his favor for the sum of $862.22. In this we are all agreed.

V. *Dissenting opinion.*

DAVIS, J., dissenting:

I dissent from so much of the opinion of the court as holds that the claimant is not entitled to recover.

The three words "in full compensation" may work some ambiguity in the statute, and by a generous expansion they can undoubtedly be made to effect an entire change of all previous laws inconsistent with the provisions which follow them. But courts do not favor repeals of statute by implication, and never regard a series of statute as thus repealed unless the new act is absolutely inconsistent with the old ones, or revises the whole subject-matter and is evidently intended as a substitute. (Winchester's case, 14 C. Cls. R., 13, and cases there cited.) I shall endeavor to show that the construction given to this statute by the majority of the court repeals by implication a whole series of acts and upsets a policy uniformly observed by the legislature since 1789. If the legislature intended this result it is the duty of a court to recognize it. As Lord Mansfield said, in Pray v. Edie (1 Term R., 313), "Whatever doubts I may have in my own breast with respect to the policy and expediency of this law, yet as long as it continues in force I am bound to see it executed according to its meaning." The intent of the legislature is, therefore, the thing which we are to seek.

This intent is first to be sought in the words of the statute. If they are not explicit, we may next inquire into the occasion and necessity of the law (Dwarris on Statutes, 562). In this connection we may refer to the current of previous legislation on the same subject-matter (Commonwealth v. Downs, 24 Pick., 227). If it be apparent that public interests will suffer by a particular construction in a doubtful case, we should not presume that such construction was intended (The People v. Com'rs, &c., 3 Scam., 153). If the subject-matter is such as to make a given construction irrational we should have regard to the subject-matter as necessarily bearing on the act

(Dwarris, 580). And we should give validity to statutes apparently in conflict, so far as they can be reconciled by any fair hypothesis. (Beals v. Hale, 4 Howard, 37, and cases cited.)

The act of 1877 contains no repeal in terms of the law making three thousand dollars the annual salary of a judge of a Territorial court. The repeal, if it is repealed, is a deduction from the supposed repugnance
14 between the section of the Revised Statutes, which fixes $3,000 as such salary, and the provision in the act of 1877, which appropriates a less sum in full compensation of such salary for one year.

It is a familiar rule in this court that the appropriation of a less sum than the amount of a debt due from the United States and the payment of the sum appropriated do not of themselves operate as a discharge and satisfaction of the debt (Collins' case). This proposition is not denied by the majority, but they contend that the statutory words, "in full compensation," in the act of 1877, operate to repeal the statute fixing $3,000 per annum as the rate of the claimant's compensation, and to establish a new rate in its place. Let us first see if "the current of previous legislation upon the same subject" gives any light for the solution of the question.

The Constitution creates but one paid executive officer—the President. It provides that he shall receive a fixed compensation, to be paid to him at stated times. It also provides that the compensation of a Federal judge shall be paid at stated times, and shall not be diminished during his continuance in office. With these exceptions it makes no provision for the payment of any person serving the government. It makes general provisions for filling official positions, and it leaves to the law-making power to determine the amount of compensation to be given to each.

Thus the Constitution in its only provisions on this subject adopts the two principles of fixedness in amount and regular intervals in time of payment as guides to the law-making power in determining the compensation of the President and of the judges of the Federal courts. The only English word which expresses these two ideas is the word "salary," which is defined to be "a stipulated periodical recompense." (Worcester's Dictionary.)

In some of its early legislation respecting the salaries of the President and the judges, Congress adopted the word "compensation" from the Constitution (1 Stat. L., 72). The same word was also used in appropriation acts, and has been retained there, uniformly, I think. But as early as February 13, 1801, the compensation of the circuit judges was styled in the statute an "annual salary" (2 Stat. L., 100). On the 3d March in the same year an act was passed "to augment the salaries of the district judges" in certain States (Ib., 121). In 1819, by "an act to increase the salaries" of certain officers of the government, it was provided that "annual salaries" should be "paid quarterly" to "the Chief Justice of the United States" and "to each of the judges of the Supreme Court of the United States" (3 Stat. L., 484). And the compensation of retired judges is styled a "salary." (Rev. Stats., 14).

Thus it appears that in practice Congress has adopted the word salary in order to express the constitutional idea of compensation to the classes of officers whose compensation the Constitution provided for. It made the following provisions for the much larger class of officials who were the creatures of legislative law, and of whom the claimant is one.

The officers of the old Department of Foreign Affairs were paid "salaries" under the resolution of the old Congress (1 Stat. L., 28). The new department, first styled Department for Foreign Affairs, but soon changed into the Department of State, fell heir to this arrangement. In a very early statute Congress enacted that annual salaries should be paid quarterly to the Secretaries and officers of the different departments (1 Stat. L., 67). The same word was used to express the compensation of Territorial officers when the Territories were organized (1 Stat. L., 123); of diplomatic representatives (Ib., 128); of the doorkeepers of Congress (Ib., 252), and of the clerks and employés in the departments (5 Stat. L., 15 523). The Revised Statutes have adopted and confirmed this nomenclature. (§§ 35; 52; 155; 167; 200; 201; 215; 234; 235; 301; 312; 316; 319; 325; 334; 343; 347; 348; 351; 389; 390; 393; 416; 438; 440; 446; 447; 448; 449; 450; 462; 470; 475; 476; 477; 517; 521; 522, &c.) From the statutes it has found its way into the common parlance of the people, and the practice of a century has crystallized it into a custom. By this usage the compensation of those who are styled officers and employés of the government, as distinguished from those employed in services requiring less education and less skill, is universally styled a salary. I understand this word as thus employed to convey the two constitutional ideas already referred to, viz: 1st. A fixed annual compensation; 2d. To be paid at stated intervals. It differs from the constitutional compensation in this respect, that the constitutional compensation cannot be diminished while the incumbent is in office; while the salary created by law can be prospectively diminished by act of Congress. But this forms no part of the definition of the word salary.

It follows from the foregoing that when the claimant received his appointment, he acquired the right to receive for the performance of its duties a fixed annual compensation payable at stated periods. The statute gave him the right to enjoy this for years. In this respect he possessed an advantage over many officials whom the Constitution and the law leave subject to executive removal at any time. His rate of compensation was undoubtedly subject to be changed by Congress, but he had the right to infer that should it be disturbed some other rate of compensation would be substituted in its place.

Now if the effect is given to these three words which my colleagues claim for them, I am at a loss to comprehend what was substituted in the place of the general provisions of law which were repealed. Before the passage of the law of 1877 the annual salary of the claimant was $3,000 (R. S., § 1879). If that provision was repealed, it is clear that nothing was put in its place except an appropriation of a less sum for the fiscal year ending June 30, 1878. No provision was made in the act of 1877 for a payment or a rate of payment beyond the latter date. It seems to me incredible that Congress intended to wipe out the previous provision as to salaries without substituting something in its place. To warrant such a conclusion we should have some stronger and more direct foundation than a deduction from three words in the statute. There can be no doubt that, in the language of one of the authorities which I have cited, "the public interests would suffer by it." The public is best served by an independent paid official. I cannot conceive that Congress intended to substitute unpaid officers for salaried officials.

Nor do I think that Congress could have intended to reduce the salary for a single year, and to restore it to its old rate at the expiration of the year. In the language of one of the authorities which I have cited, that proposition strikes me as "irrational." I dare not presume, in the absence of express words, that the legislature intentionally debased the salaries of public officers for a single year, with the intention of restoring them to the old standard at the close of the year.

Prior to the act of March, 1877, it had been the uniform policy of Congress, when creating an office, to attach to it a fixed salary. Congress had the undoubted right, except as restrained by the Constitution, to create offices without salaries, or to make the salaries dependent upon the will of an accidental majority. If it intended to do so, I think it would have expressed its intent in terms in the statute. If the act of 1877 made no provision for a rate of compensation to the claimant
16 beyond the then current year, and if it is irrational and contrary to public policy to suppose that Congress meant to leave a public official, in the discharge of a necessary public duty, without the right to a salary, it seems to me more reasonable, more probable, more in accordance with public interests and with the probable intent of the legislature to presume that the three words, "in full compensation," in the act of 1877 have no force. I prefer to leave it to the legislative body hereafter, if the court has misinterpreted its will, to indicate it in a more direct and unequivocal manner, rather than deduce such sweeping detailed results from general words at the head of an appropriation bill, in which twenty-five pages of appropriations are made "in full compensation for the service of the fiscal year."

The same general considerations apply to the act of 1878. That act differs from the act of 1877 in that it contains a general repealing clause of all acts inconsistent with or in conflict with its provisions. I do not feel inclined to infer from such general language, which may be applicable to many other things in the statute, a reversal of a long-settled policy, but rather prefer with this statute, as with the other, to leave fixed salaries attached to such offices by law until Congress shall directly legislate that no salary is attached to them, or shall in terms permanently change their amount.

17 VI. *Final judgment.*

At a Court of Claims, held in the city of Washington on the 10th day of May, 1880, Judge Richardson read the opinion of the court, and judgment pro forma was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said Joseph W. Fisher do have and recover of and from the United States the sum of eight hundred and sixty-two dollars and twenty-two cents ($862.22).

18 VII. *Application of defendants for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 10th day of May, 1880, in favor of claimant, the defendants, by their attorney-gen-

eral, on the 12th day of June, 1880, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney-General.

Filed June 12, 1880.

AT CHAMBERS.

Allowed.

C. D. DRAKE,
Chief Justice.

19 In the Court of Claims.

JOSEPH W. FISHER
vs.
THE UNITED STATES. } No. 12117.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the dissenting opinion, of the final judgment by the court, of the application of the defendants for the allowance of an appeal to the Supreme Court of the United States, and of the order of the chief justice allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 29th day of September, 1880.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 293. The United States, appellant, Joseph W. Fisher. Court of Claims. Filed 29 September, 1880.

109-143

OFFICE SUPREME COURT U.S.
FILED
MAR 30 1883
JAMES H. McKENNEY, CLERK

In the Supreme Court of the United States.

THE UNITED STATES, Appellant,
vs.
JOSEPH W. FISHER, Appellee. } No. 293.

BRIEF OF APPELLEE.

This is an appeal from a judgment of the Court of Claims, from the following findings of fact:

1. The claimant was Chief Justice of Wyoming Territory from February 14, 1876, to November 26, 1879.

2. Up to and including June 30, 1877, he was paid his salary, at the rate of $3,000 a year.

3. From the 30th of June, 1877, to and including November 26, 1879, he was paid, and received without protest, compensation as such Chief Justice, at the rate of $2,600 a year.

This appeal being from a *pro forma* judgment, we submit the following statement:

Congress, by an Act approved June 17th, 1870, fixed the compensation to be paid to the person who should hold the office of Chief Justice of Wyoming Territory at $3,000 per annum.

The Act of Congress is as follows:

"An Act to regulate the salaries of Chief Justice and Associate Justices in the Territories:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That

from and after the passage of this act the salaries of the Chief Justices and Associate Justices of the Territories of * * * Wyoming * * * shall be three thousand dollars each per annum."

16 Stats. at Large, p, 152.

March 13, 1877, Congress passed an act entitled—

"An Act making appropriations for the Legislative, Executive and Judicial expenses of the Government for the year ending June 30, 1878, and for other purposes."

This Act provides—

"Be it enacted, &c., That the following sums be, and the same are hereby, appropriated out of any money in the Treasury not otherwise appropriated, *in full compensation* for the service of the fiscal year ending June 30, 1878, for the objects hereinafter expressed, namely:

* * * * * *

Government in the Territories, Territory of Wyoming—For salaries of Governor, Chief Justice and two Associate Justices at two thousand six hundred dollars each, and Secretary at one thousand eight hundred dollars, $12,200."

Stats at Large, Vol. 19, p. 294.

The appropriation acts for the fiscal years ending June 30, 1879, and June 30, 1880, were identical regarding the question submitted with the Act of June 30, 1878, except that the Appropriation Act of June 30, 1878, *contained no repealing clause.*

POINTS.

I.

The claimant was Chief Justice of Wyoming Territory from February 14, 1876, to November 26, 1879.

His salary was fixed by law at $3,000 per annum, and, while he remained undisturbed in the discharge of the

duties of the office, he was entitled to the compensation which the United States had, by the Act of June 17, 1870, agreed to pay him.

Butler *vs.* Pennsylvania, 10 How., 414.

II.

The appropriation acts of Congress do not alter, repeal or amend general and continuing laws.

Art. 1, Sec. 8, of the Constitution of the United States provides that "Congress shall have power * * * to constitute tribunals inferior to the Supreme Court," and it is too well settled to need the citation of authority that the power to constitute these tribunals carries with it the power in *Congress* to defray the expenses of maintaining them. But this should be done by Congress, not by one branch of it, viz, the House of Representatives, but by both the Senators and Representatives of the people.

Art. 1, Sec. 7, clause 1 of the Constitution, which says:

"All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills."

The proposition that all bills for raising money to defray the expenses of the Government should originate in the House of Representatives was one which, at the time of the adoption of the Constitution, caused much debate and discussion.

It was objected that it would "introduce into the House of Representatives the practice of tacking foreign matter to money bills," but the clause which was agreed upon, was with the understanding that its language, as above quoted, prevented the House from "inserting other things in money bills."

Elliott's Debates on the Constitution, Vol. 5, pp. 414–420.

Clause 7, Sec. 9, Art. 1, that "no money shall be drawn from the Treasury but in consequence of appropriations made by law," is simply directory to the officers of the Treasury, and neither this clause or clause 1 of section 7, above quoted, was intended to include anything but the payment of the money demands against the Government.

The office of Chief Justice of this Territory could only be created by Congress, by bill which, under the Constitution, could be introduced in either branch of Congress, and the power which created the office is the only power which can take it away. It can only be done by a bill which, under the Constitution, can be introduced in Congress, and not by a bill which can only originate in the House of Representatives.

III.

But it is objected that the words, "in full compensation," as they occur in the preamble to the appropriation acts referred to, were inserted by Congress with intent that the sum appropriated in the act should be in full for any demand the claimant might have for services rendered by him under the provisions of the law of June 17, 1870.

And the court below in its opinion says:

"There is no doubt that the words 'in full compensation' were introduced into these appropriation acts for the very purpose of reducing, for the respective years for which the appropriations were made, the compensation of those officers for whom the appropriations were less than the salaries established by previous laws. They were inserted as a compromise between those who favored a permanent reduction of salaries and those who opposed any reduction. A temporary reduction was finally agreed upon in this form."

Record, p. 7.

We submit that this is not the construction to be put upon these words.

The title of the act referred to is:

"An Act making appropriations for the legislative, executive, and judicial expenses of the Government, for the fiscal year ending June 30, 1879, and for other purposes."

If there is any doubt as to the intent of Congress, we are at liberty to seek aid in determining the question by referring to the title of the act.

United States *vs.* Palmer, 3 Wheat 610.

From the title of this bill it is plain that the only object Congress had in the passage of this act, was to make appropriation of money to defray the expenses of the legislative, executive, and judicial expenses of the Government, as we have shown they could do nothing else in a bill which could originate solely in the House of Representatives.

If it should be urged that the words "for other purposes" shows an intent on the part of Congress to include general legislation in the act, then we submit that the words can have no meaning; that they are merely "surplusage," and can have no effect, being in violation of Sec. 11, of the Rev. Stats., viz:

Sec. 11. The style and title of all acts making appropriations for the support of Government, shall be as follows: "An act making appropriations (here insert the object) for the year ending June 30, (here insert the calendar year.")

It will not be contended that if the title of the act had been "for other purposes," "or for certain purposes," that an act passed under such a title would be of any effect. We submit that Congress had no power in the appropriation act to repeal the law of June 17, 1870. That the title of the act shows they intended to do nothing more

than to pay the expenses of the different branches of the Government named for the fiscal year.

The Act of June 17, 1870, section 1879, R. S., fixing the salary of the Chief Justice of Wyoming Territory at $3,000 per annum, and the annual appropriation acts appropriating $2,600 per annum for the salary of this official, with the words *in full compensation* inserted in the introductory clauses, are affirmative statutes, and should be construed together. One statute is not to be construed as a repeal of another, if it be possible to reconcile the two together.

Hatford *vs.* United States, 8 Cranch, 109;
McCool *vs.* Smith, 1 Black, 459;
Johnson *vs.* Byrd, Hempst , 434;
McLaughlin *vs.* Hoover, 1 Orgon, 31;
Winter *vs.* Norton, 1 Id., 42.

These words *in full compensation*, as used in the appropriation acts, have the plain ordinary meaning of a prohibition on the executive branch from paying more than the amounts appropriated for each specific object named, and in construing them, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and is to be ascertained from the language used.

United States *vs.* Pacific R. R. Co., 91, U. S. R., 72.
United States *vs.* Fisher, 2 Cranch, 358.

To hold that these words, as used in the appropriation acts, repealed the Act of June 17, 1880, would be to establish a repeal by implication, which is not favored.

Courts do not favor repeals of statutes by implication, although subsequent laws cover some, or even all the

cases provided for by the prior statute; they may, nevertheless, be merely affirmative, cumulative, or auxiliary. In order to sustain a repeal by implication, there must be a positive repugnancy between the provisions of the new law and those of the old (Wood *vs.* United States, 16 Pet., 363), which makes it absolutely impossible to reconcile the two (McCool *vs.* Smith, 1 Black., 471; United States *vs.* Gillis, 95 U. S. R., 415 & 416). A prior statute will not be regarded as repealed by a later one by implication, unless the latter is either entirely inconsistent with the former or reverses the whole subject-matter, and is evidently intended as a substitute for it.

Farr *vs.* Brackett, 30 Vt., 344;
Giddings *vs.* Cox, 31 Vt., 607;
Longlois *vs.* Longlois, 48 Ind., 60;
Lewis *vs.* Stone, 22 Wis., 234;
New London R. R. Co. *vs.* B. & A. R. R. Co., 102 Mass., 386.

The opinion of the court below that the words "in full compensation," worked a temporary repeal of the Act of June 17, 1870, is in effect the same as if they (the court) held if Congress failed to pass a similar appropriation act before the close of the fiscal year, that the salary, as fixed by the former act, would begin to accrue; that the former act repealed is revived without express words to that effect.

This construction evidently contravenes the spirit and intent, if not the letter, of section 12 of the Revised Statutes: "Whenever an act is repealed, which repealed a former act, such former act shall not thereby be revived, unless it shall be expressly so provided."

United States *vs.* 25 cases cloth, Crabbe, 356;
Warren *vs.* Windle, 3 East Term, R., 205.

IV.

Where the words of a statute, fixing the compensation of a public officer, are loose and obscure, and admit of two interpretations, they should be construed in favor of the officer.

U. S. *vs.* Morse, 3 Story, 87.

V.

It is objected that the appellee, having received the amount of $2,600 a year, without protest, is estopped from claiming more than that sum.

This, we submit, is not the law. In order that the claimant may be estopped from claiming the full amount of his salary as fixed by the *Congress* of the United States, it must appear that he received the sum of $2,600 with full knowledge of all the facts, and that he consented to continue in the office and discharge its duties for a less sum than the amount fixed by law. The burden of proof to show this was upon the appellant, and no such proof was offered.

VI.

We submit the very able dissenting opinion of Judge DAVIS in support of the brief of the appellee:

DAVIS, J., dissenting:

I dissent from so much of the opinion of the court as holds that the claimant is not entitled to recover.

The three words "*in full compensation*" may work some ambiguity in the statute, and by a generous expansion they can undoubtedly be made to effect an entire change of all previous laws inconsistent with the provisions which follow them. But courts do not favor repeals of statute by implication, and never regard a series of statute as thus repealed unless the new act is absolutely inconsistent with the old ones, or revises the whole subject-matter and is evidently intended as a substitute (Winchester's case,

14, C. Cls. R., 13, and cases there cited.) I shall endeavor to show that the construction given to this statute by the majority of the court repeals by implication a whole series of acts and upsets a policy uniformly observed by the legislature since 1789 If the legislature intended this result it is the duty of the court to recognize it. As Lord Mansfield said in Pray *v.* Edie (1 Term R., 313), "Whatever doubts I may have in my own breast with respect to the policy and expediency of this law, yet, as long as it continues in force I am bound to see it executed according to its meaning." The intent of the legislature is, therefore, the thing which we are to seek.

This intent is first to be sought in the words of the statute. If they are not explicit, we may next inquire into the occasion and necessity of the law (Dwarris on Statutes, 562). In this connection we may refer to the current of previous legislation on the same subject-matter, (Commonwealth *v.* Downs, 24 Pick., 227). If it be ap parent that public interests will suffer by a particular construction in a doubtful case, we should not presume that such construction was intended (The People *v.* Com'rs, &c., 3 Scam , 153). If the subject-matter is such as to make a given construction irrational we should have regard to the subject-matter as necessarily bearing on the act (Dwarris, 580). And we should give validity to statutes apparently in conflict, so far as they can be reconciled by any fair hypothesis. (Beals *v.* Hale, 4 Howard, 37, and cases cited.)

The act of 1877 contains no repeal in terms of the law making three thousand dollers the annual salary of a judge of a Territorial court. The repeal, if it is repealed, is a deduction from the supposed repugnance between the section of the Revised Statutes which fixes $3,000 as such salary, and the provision in the act of 1877, which appropriates a less sum in full compensation of such salary for one year.

It is a familiar rule in this court that the appropriation of a less sum than the amount of a debt due from the United States and the payment of the sum appropriated do not of themselves operate as a discharge and satisfaction of the debt (Collins' case). This proposition is not denied by the majority, but they contend that the statu-

tory words "in full compensation," in the act of 1877, operate to repeal the statute fixing $3,000 per annum as the rate of the claimant's compensation, and to establish a new rate in its place. Let us first see if "the current of previous legislation upon the same subject" gives any light for the solution of the question.

The Constitution creates but one paid executive officer—the President. It provides that he shall receive a fixed compensation, to be paid to him at stated times. It also provides that the compensation of a Federal judge shall be paid at stated times, and shall not be diminished during his continuance in office. With these exceptions it makes no provision for the payment of any person serving the Government. It makes general provisions for filling official positions, and it leaves to the law-making power to determine the amount of compensation to be given to each.

Thus the Constitution, in its only provisions on this subject, adopts the two principles of *fixedness in amount* and *regular intervals in time of payment* as guides to the law-making power in determining the compensation of the President and of the judges of the Federal courts. The only English word which expresses these two ideas is the word "salary," which is defined to be "a stipulated periodical recompense." (Worcester's Dictionary.)

In some of its early legislation respecting the salaries of the President and the judges, Congress adopted the word "compensation" from the Constitution (1 Stat. L., 72). The same word was also used in appropriation acts, and has been retained there, uniformly, I think. But as early as February 13, 1801, the compensation of the circuit judges was styled in the statute an "annual salary" (2 Stat. L., 100). On the 3d March, in the same year, an act was passed "to augment the salaries of the district judges" in certain States (Ib., 121). In 1819, by "an act to increase the salaries" of certain officers of the Government, it was provided that "annual salaries" should be "paid quarterly" to "the Chief Justice of the United States," and "to each of the judges of the Supreme Court of the United States" (3 Stat. L., 484). And the compensation of retired judges is styled a "salary" (Rev. Stats., 14).

Thus it appears that in practice Congress has adopted the word salary in order to express the constitutional idea of compensation to the classes of officers whose compensation the Constitution provided for. It made the following provisions for the much larger class of officials who were the creatures of legislative law, and of whom the claimant is one.

The officers of the old Department of Foreign Affairs were paid "salaries" under the resolution of the old Congress (1 Stat. L., 28). The new department, first styled Department of Foreign Affairs, but soon changed into the Department of State, fell heir to this arrangement. In a very early statute Congress enacted that annual salaries should be paid quarterly to the Secretaries and officers of the different departments (1 Stat. L, 67.) The same word was used to express the compensation of territorial officers when the Territories were organized (1 Stat. L., 123); of diplomatic representatives (Ib., 128;) of the doorkeepers of Congress (Ib., 252), and of the clerks and employees in the departments (5 Stat. L., 523.) The Revised Statutes have adopted and confirmed this nomenclature. (§§35; 52; 155; 167; 200; 201; 215; 234; 235; 301; 312; 316; 319; 325; 334; 343; 347; 348; 351; 389; 390; 393; 416; 438; 440; 446; 447; 448; 449; 450; 462; 470; 475; 476; 477; 517; 521; 522, &c. From the statutes it has found its way into the common parlance of the people, and the practice of a century has crystalized it into a custom. By this usage the compensation of those who are styled officers and employees of the Government, as distinguished from those employed in services requiring less education and less skill, is universally styled a salary. I understand this word as thus employed to convey the two constitutional ideas already referred to, viz: 1st. A fixed annual compensation; 2d. To be paid at stated intervals. It differs from the constitutional compensation in this respect, that the constitutional compensation cannot be diminished while the incumbent is in office; while the salary created by law can be prospectively diminished by act of Congress. But this forms no part of the definition of the word salary.

It follows from the foregoing that when the claimant received his appointment, he acquired the right to re-

ceive for the performance of its duties a fixed annual compensation payable at stated periods. The statute gave him the right to enjoy this for years. In this respect he possessed an advantage over many officials whom the Constitution and the law leave subject to executive removal at any time. His rate of compensation was undoubtedly subject to be changed by Congress, but he had the right to infer that should it be disturbed some other rate of compensation would be substituted in its place.

Now if the effect is given to these three words which my colleagues claim for them, I am at a loss to comprehend what was substituted in the place of the general provisions of law which were repealed. Before the passage of the law of 1877 the annual salary of the claimant was $3,000 (R. S., § 1879). If that provision was repealed, it is clear that nothing was put in its place except an appropriation of a less sum for the fiscal year ending June 30, 1878. No provision was made in the act of 1877 for a payment or a rate of payment beyond the latter date. It seems to me incredible that Congress intended to wipe out the previous provision as to salaries without substituting something in its place. To warrant such a conclusion we should have some stronger and more direct foundation than a deduction from three words in the statute. There can be no doubt that, in the language of one of the authorities which I have cited, "the public interests would suffer by it." The public is best served by an independent paid official. I connot conceive that Congress intended to substitute unpaid officials for salaried officials.

Nor do I think that Congress could have intended to reduce the salary for a single year, and to restore it to its old rate at the expiration of the year. In the language of one of the authorities which I have cited, that proposition strikes me as "irrational." I dare not presume, in the absence of express words, that the legislature intentionally debased the salaries of public officers for a single year, with the intention of restoring them to the old standard at the close of the year.

Prior to the act of March, 1877, it had been the uniform policy of Congress, when creating an office, to attach

to it a fixed salary. Congress had the undoubted right, except as restrained by the Constitution, to create offices without salaries, or to make the salaries dependent upon the will of an accidental majority. If it intended to do so, I think it would have expressed its intents in terms in the statute. If the act of 1877 made no provision for a rate of compensation to the claimant beyond the then current year, and if it is irrational and contrary to public policy to suppose that Congress meant to leave a public official, in the discharge of a necessary public duty, without the right to a salary, it seems to me more reasonable, more probable, more in accordance with public interests and with the probable intent of the legislature to presume that the three words, "in full compensation," in the act of 1877 have no force. I prefer to leave it to the legislative body hereafter, if the court has misinterpreted its will to indicate it in a more direct and unequivocal manner, rather than deduce such sweeping detailed results from general words at the head of an appropriation bill, in which twenty-five pages of appropriations are made "in full compensation for the service of the fiscal year."

The same general considerations apply to the act of 1878. That act differs from the act of 1877 in that it contains a general repealing clause of all acts inconsistent with or in conflict with its provisions. I do not feel inclined to infer from such general language, which may be applicable to many other things in the statute, a reversal of a long-settled policy, but rather prefer with this statute, as with the other, to leave fixed salaries attached to such offices by law until Congress shall directly legislate that no salary is attached to them, or shall in terms permanently change their amount.

J. THOMAS TURNER.
THEODORE H. N. McPHERSON.